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No. 85-489

In The

Supreme Court of the United States

October Term, 1985

LEONARD C. JAQUES,
Petitioner,

v.

THE HONORABLE ANN ALDRICH,
UNITED STATES DISTRICT JUDGE
FOR THE NORTHERN DISTRICT OF OHIO,
and REISS STEAMSHIP COMPANY,
Respondents.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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STATEMENT OF THE CASE

This Petition for Writ of Certiorari arises from the split decision of the United States Court of Appeals for the Sixth Circuit [*In re Jaques*, 761 F2d 302 (6th Cir, 1985)] affirming the contempt citation of an attorney. A full Statement of the Case has been provided in the Petition at pp. 2-10. Instead of restating the facts at length, Petitioner will discuss them in the context of the issues presented.

ARGUMENT

I.

WHETHER, IN A CONTEMPT ACTION AGAINST AN ATTORNEY, THE "CIVIL" NATURE OF THE CHARGE RENDERS INAPPLICABLE THE PROTECTIONS AFFORDED BY DUE PROCESS GUARANTEES TO ALLEGED CRIMINAL CONTEMNORS.

The issue presented is whether the traditional due process rights of alleged contemnors [imposition of the burden of proof on the charging party; the prohibition against a contempt citation which has no evidentiary basis; the right to confront adverse witnesses (to be free from a citation based on *ex parte* communications with the fact-finder); and the right to an impartial decision-maker] are inapplicable because of the "civil" nature of the charges. In her Brief in Opposition ("Opposition"), Respondent contends that this issue is not preserved, that Petitioner was afforded all due process rights, and that this Court should not grant review.

To be sure, Petitioner did not enmesh himself in an extended discussion of the nuances of "civil" contempt during the contempt hearing. This is scarcely surprising since Respondent herself declined to respond to Petitioner's attempt to discern whether the proceedings were "civil" or "criminal" (53a, 54a). Indeed, Respondent believed that she was dealing with a "criminal" contempt (27a). The appellate judges divided on the proper characterization of the proceedings. Petitioner cannot be faulted for failing to present issues of "civil" contempt jurisprudence in the trial court when the case was "criminal" in that forum.

The Court of Appeals found no "preservation" impediment, as it decided the constitutional question on the merits. This Court should likewise deem the issue preserved.

The issues which Petitioner seeks to have reviewed by this Court were all presented to the Court of Appeals. There, Petitioner urged that the contempt citation be reversed on the ground that there was no way to confidently determine

whether the contempt proceedings were criminal or civil in nature [Appellant's Brief on Appeal ("Brief"), pp. 18-20]. Because of this uncertainty, Petitioner assumed that they were criminal, but contended that the same outcome would be required under a civil contempt analysis, and that the due process rights implicated were the same in either event (Brief, p. 21, fn. 9; p. 38, fn. 12). Specifically, Petitioner claimed that he had been denied due process by the Court thrusting upon him the burden of disproving the contempt charges (Brief, pp. 22-24, 39), by a contempt finding reached despite the lack of any supporting evidence presented at the hearing (Brief, pp. 22-24, 33, 39), by the Court's reliance on *ex parte* conversations conducted in Petitioner's absence (Brief, pp. 31, 33, 40-42), and by the partiality and multiple capacities of the trial judge (Brief, pp. 42-49).

Finally, the precise issue presented stems from the unanticipated tack taken by the Sixth Circuit majority in justifying affirmance. Until issuance of the appellate decision, there was no construction of the contempt as "civil," and consequently there was no occasion to consider the constitutional implications flowing from use of that label. Petitioner has amply "preserved" his quest for review of the rationale employed by the Court of Appeals.

Respondent has alleged that Petitioner in fact received the procedural protection that would have existed if the contempt proceeding were viewed as "criminal" (Opposition, pp. 7-10). Suffice it to note that the Court of Appeals was unable to conclude that Petitioner was afforded the due process protections available to an alleged criminal contemnor; it was able to affirm only on the basis that, because of the "civil" nature of the proceedings, these protections did not apply.

Respondent suggests that the trial court was justified in finding Petitioner in contempt without any formal evidence because she already had personal knowledge of all the facts before the hearing was conducted. Let us temporarily overlook the independent due process problems presented by a

contempt citation issued by a fact-finder that had already prejudged the outcome prior to providing the accused an opportunity to be heard. Respondent's contention is factually untenable. At the contempt hearing,[1] and in her Memorandum and Order,[2] Respondent relied on unproven "facts" which were plainly not within the Court's own knowledge, and could only have been gleaned from *ex parte* conversations with others (never presented as witnesses) conducted in Petitioner's absence.

In finding Petitioner guilty of misrepresentation (*see* Issue III), the Court was, at the least, required to compare the representations with the actual facts. She was required to determine what Baun told her clerk (purportedly, that Petitioner was engaged in trial in Baltimore) with the actual facts (whether he was in Baltimore). Respondent had first-hand knowledge of *neither* component.

Regarding the allegation that Petitioner disobeyed an "order," the Court was required to determine what was told to Petitioner (*i.e.*, *what* he was "ordered" to do) (Issue II). This, in turn, hinges on what Respondent's clerk said to Petitioner, another matter outside the Court's personal knowledge. Whether Petitioner obtained adequate substitute counsel (which Respondent deemed would satisfy any order to attend) depended on Mr. Swickle's ability to try the case in Petitioner's stead, a matter on which the Court depended on statements made to her by Swickle in Petitioner's absence.

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[1] *See* 50a, 53a, 54a, 56a, 62a (conversations between Respondent and Judge Howard); 50a (conversations between Mr. Baun and Mr. Swickle). The judge also referred to conversations involving "the Court," which apparently were actually between Baun and the Court's clerk and presumably related to the judge by her clerk (*see* 49a, 69a, 70a, 71a).

[2] *See* 18a, 21a, 34a (conversations between Respondent and Judge Howard); 20a (conversations between Mr. Baun and Mr. Swickle); 22a, 25a, 27a, 31a (conversations between Respondent and Mr. Swickle). This was done despite Petitioner's contention at the contempt hearing that the Court was mistaken and misinformed as to the actual occurrences (72a).

This was not one of the extraordinary "direct" contempts in which, since all relevant facts are known to the court through its own senses, the court may summarily issue a finding of contempt allowing only an opportunity for the contemnor to allocute regarding factors which may mitigate punishment (*see* Petition, pp. 11-13). It was not so treated by either of the lower courts, and should not be so treated by this Court.

As her alternative argument, Respondent posits that it was entirely proper for her to impose on Petitioner the burden of disproving the contempt charges, citing *United States* v *Rylander*, 460 U.S. 752 (1983). *Rylander* involved the unique two-stage procedure for enforcement of an IRS summons. In *Rylander*, the Respondent was served with a summons and failed to produce the documents sought, thus commencing the first-stage proceedings to obtain an order enforcing the summons. At this hearing, the Court ordered enforcement, a ruling which conclusively established that Rylander was then in possession of the records sought (460 U.S. at 756-757, 760). There was no claim that Rylander was given anything less than a full, fair, and constitutionally adequate hearing at this time.

Rylander then disobeyed the enforcement order, thus triggering the second stage: a contempt hearing for non-compliance (460 U.S. at 760). The contention available to the non-producer was the lack of present possession, a contention denominated a "defense" by the *Rylander* Court (460 U.S. at 755, 757, 760). Settled procedures imposed on the alleged contemnor the burden of coming forward with evidence to disprove the presumption arising from the initial enforcement order (460 U.S. at 755, 757, 760).

Unlike this case, the trial judge in *Rylander* endeavored to hold a testimonial contempt hearing. When Rylander refused to submit to cross-examination, asserting the privilege against self-incrimination, the District Court found that Rylander had failed to present evidence in support of the defense of non-possession, and therefore issued a contempt citation which this Court ultimately sustained.

Nothing in the *Rylander* opinion supports the broad proposition that the burden of proof in all civil contempt actions is imposed on the accused. The decision in that case is limited to its facts and to the unique two-stage setting in which civil contempt may be invoked to enforce an IRS summons. It is one thing to say that one who has had a full and fair hearing on the issue of possession of records, and who is afforded a second testimonial hearing, may be held to the burden of refuting a presumption arising from the prior adjudication. It is quite another to say, as Respondent suggests, that Petitioner was entitled to no testimonial hearing at all and was forced to disprove allegations never previously adjudicated.

Petitioner has previously pointed out the unprecedented tack taken by the Sixth Circuit in making the "civil" or "criminal" nature of the proceedings determinative of whether due process requires anything more than notice of the charges and an opportunity to be heard. Where the lower courts have erred is in viewing the critical distinction as "civil/criminal" rather than "direct/indirect" (Petition, pp. 11-20).

In response, Respondent points out that the distinction between civil and criminal contempts has long been recognized (Opposition, p. 11). This observation misses the mark. To be sure, the theoretical nuances distinguishing the two may be generally understood, though difficult to apply. The fine line that divides the two is simply not what this case is all about.

What *is* involved is the issue of whether the "civil" label renders inapplicable such fundamental procedural protections as the right to insist that the charging party bear the burden of proving the allegations by competent evidence, and the right to be free from a conviction predicated on *ex parte* conversations conducted by the fact-finder in the accused's absence. *Those* questions have never been addressed by this Court. They should be.

II.

THE CONSTRUCTION OF 18 USC § 401(3)

The ruling below finds Petitioner in contempt for the fact that Mr. Swickle appeared to represent the plaintiff in *Ahmed*, rather than Petitioner who was verbally informed that his attendance was "expected." Thus are raised important issues of statutory construction: whether a telephonic message of expectation is an "order" within the meaning of 18 USC § 401(3) and, if so, whether an attorney fulfills his obligation by obtaining the appearance of an associate in his stead (Petition, pp. 21-25).

Respondent urges that trial courts who contemplate invoking the contempt power should not be required to first employ formal orders, because it would be "burdensome" to do so (Opposition, p. 17). There is room for serious debate over how "burdensome" it would really be for courts to employ orders when they intend to find in contempt those who ruffle judicial feathers. What is beyond debate is that these are the sort of policy decisions which have already been made by Congress when it enacted 18 USC § 401(3) with the intent to severely circumscribe use of the awesome contempt power. *Nye* v *United States*, 313 U.S. 331 (1941); *Cammer* v *United States*, 350 U.S. 399 (1956). It is not the province of this Court to second-guess the wisdom of the "burdensome" limitations which Congress intentionally interposed.

Respondent also acknowledges in principle that Mr. Swickle's presence might be deemed to fulfill any obligation imposed by the "Order" if he had "full authority to settle and to try the case" (Opposition, p. 18). She argues, however, that he was not an "adequate substitute."

The first flaw with this argument is that the impression that Mr. Swickle was not an adequate substitute was an impression which the Court gleaned from the conversations with Swickle on October 26th conducted in Petitioner's absence. *In re Oliver*, 333 U.S. 257 (1948) makes clear the

constitutional impermissibility of premising a contempt finding on "facts" developed in this *ex parte* fashion.

The second flaw is the notion that *any* attorney *ever* has the authority to unilaterally settle the client's case. On October 26, 1983, progress was made toward settlement, Swickle discussed the settlement offer with the client, and it was Mr. Ahmed who resisted settlement (44a-45a; 68a). The adequacy of Mr. Swickle is not impugned by his adherence to ethical strictures which forbade him from compromising his client's cause over the client's objection.

The final flaw is that there is absolutely no record support for the contention that Mr. Swickle was not prepared to try the case. This question was not even addressed at the proceedings of October 26th (43a-46a), and at the contempt hearing, both Swickle and Petitioner confirmed that the former was prepared to try the case (56a, 58a, 59a, 66a-67a, 68a).

Mr. Swickle was a demonstrably "adequate" substitute. This case squarely presents the issue on which the circuit courts are divided: whether an attorney who obtains adequate substitute counsel may nonetheless be held in contempt for the failure to personally appear.

III.

THE CONSTRUCTION OF 18 USC § 401(1)

Petitioner has challenged the rulings below which find him in contempt under 18 USC § 401(1) for purportedly misrepresenting to the Ohio trial judge that he was engaged in trial in Baltimore. He has contended that he made no such representations; that § 401(1) is not to be construed as permitting vicarious contempt liability for purported misrepresentations made by his associate, Mr. Baun; and that any misrepresentations by Baun from Baltimore did not occur "so near" to Respondent in the geographic sense used in the statute (Petition, pp. 27-29).

At the contempt hearing, Respondent continually referred to alleged misrepresentations made by Petitioner (53a, 54a, 62a). In her Memorandum and Order, as well, she found that Petitioner himself made misrepresentations (23a, 29a, 30a). Her Opposition fails to cite a single alleged misrepresentation made by Petitioner, and tacitly admits that Petitioner himself made no actionable misrepresentation.

Recognizing the untenability of any contempt citation predicated on Baun's telephone call, Respondent disavows any such holding, and now claims that the misrepresentation for which Petitioner was held liable was that of Swickle[3] (Opposition, pp. 21, 22). There are substantial grounds for questioning the accuracy of the construction currently offered by Respondent,[4] but in any event the contempt citation is no more tenable under the Swickle rationale than under the Baun rationale previously addressed.

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[3] It is also contended that the misconduct under § 401(1) consisted in Petitioner's October 19th telephone call requesting a continuance and his failure to appear at trial on the 26th (Opposition, p. 20). This contention cannot withstand scrutiny.

Petitioner was not in the Court's presence or in close physical proximity on the 26th. Indeed, it was the very fact that Petitioner was *not* nearby that provoked the institution of contempt proceedings.

One is at a complete loss to understand how the telephone call of the 19th requesting an adjournment constitutes contumacious misconduct by Petitioner. The call was made by unnamed office personnel rather than Petitioner and accurately related the current status of the Baltimore trial (19a-20a). Even if the prediction that the trial would be completed five days later could somehow be deemed the sort of representation of fact upon which to hang a contempt conviction, the relevant conduct occurred in Detroit and is therefore beyond the scope of § 401(1) for the same reasons discussed regarding Baun's Baltimore call.

[4] At the contempt hearing, the Court made only one oblique reference to purported statements by Swickle regarding Petitioner's whereabouts, "there was a discussion and representations made by counsel [on October 26th]" (60a). In contrast, the Court repeatedly referred to the Baun call (49a, 69a, 70a, 71a). When Respondent discussed the "two problems" [two charges], one of these was "the representation that was made by Mr. Baun on the telephone on Tuesday evening that you would in fact be in Baltimore on Wednesday" (65a). The Court of Appeals did not construe the contempt finding in the fashion advocated by Respondent. Both the lead Opinion and Dissent referred only to the Baun phone call (2a, 16a). It is thus quite clear that it was the Baun telephone call which was the purported misrepresentation for which Petitioner was found vicariously liable.

Concededly the hypothesis that the critical representations were those of Swickle would defeat Petitioner's contention that § 401(1) is unsatisfied due to the absence of the "presence or so near" element. Unlike the statements of Baun, those of Swickle were in fact made in the Court's presence.

To cast the case in this fashion, however, demonstrates all the more vividly the unconstitutionality of the proceedings below. The only statement of Swickle in this regard is (43a):

> "THE COURT: . . . Mr. Swickle, do you have any idea where Mr. Jacques (*sic*) is today?
> MR. SWICKLE: No, I don't. To my knowledge, he is in Baltimore in this trial."

There is not a scintilla of evidence that Swickle in fact knew where Petitioner was or that he knew that Petitioner was not in Baltimore. Respondent has not even suggested that there exists any evidence that the quoted statements were untrue. That Petitioner has been found in contempt for Swickle's honest response to the Court's question vividly demonstrates the manifest injustice wrought by the decisions below.

Thus, we are brought full circle back to the question of whether one may constitutionally be held in contempt in the utter absence of any competent evidence adduced in support of the charges, simply because the contempt is denominated "civil." The central due process and statutory construction issues warrant this Court's attention.

CONCLUSION

Petitioner submits that the issues presented are worthy of this Court's attention. Respondent's Brief in Opposition does not detract from this conclusion. A writ of certiorari should be issued.

Respectfully submitted,

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